

No. 14-0439 BN

The State Board of Nursing (“Board”) filed a complaint on April 8, 2014, seeking this Commission’s determination that cause exists to discipline Femmer’s license as a licensed practical nurse (“LPN”). Femmer was served with a copy of the complaint and notice of complaint/notice of hearing on April 15, 2014. A hearing was held on September 17, 2014. Angela S. Marmion represented the Board. Femmer appeared *pro se*. The Board filed its brief on October 16, 2014. Respondent’s brief was due on November 19, 2014; however, nothing was filed. Therefore, this case was ready for decision on November 20, 2014.

Commissioner Audrey Hanson McIntosh, having read the full record including all the evidence, renders the decision. Section 536.080.2, RSMo 2000;¹ *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App., S.D. 2002).

Findings of Fact

1. Femmer is licensed by the Board as an LPN. Her license was current and active at all times relevant to these findings.
2. Femmer submitted to a pre-employment urine drug screening on November 27, 2012.
3. Femmer tested positive for THC, a metabolite of marijuana.
4. Femmer did not have a prescription for marijuana.²

Conclusions of Law

We have jurisdiction to hear the case. § 621.045. The Board has the burden of proving that Femmer has committed an act for which the law allows discipline. *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989). The Board alleges that there is cause for discipline under the following provisions of § 335.066:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

¹ Statutory references are to RSMo Supp. 2013 unless otherwise indicated.

² Marijuana is a Schedule 1 controlled substance pursuant to § 195.017.2(4)(w).

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

Controlled Substances – Subdivisions (1) and (14)

Section 195.202 provides:

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

The Board's complaint asserts cause for discipline under subdivisions (1) and (14) in that Femmer tested positive for marijuana, did not have a prescription for marijuana, and presumptively possessed marijuana. Pursuant to § 324.041, a licensee who tests positive for a controlled substance without a valid prescription is presumed to have unlawfully possessed the controlled substance in violation of drug laws. Femmer admitted that she tested positive and that she did not have a lawful prescription.

However, she denied smoking marijuana; instead, she testified that a few days before the pre-employment drug test, she went to a concert with family members who smoked marijuana in her presence and she inhaled the smoke. Femmer denied actually smoking marijuana because she could not afford to use drugs. Femmer's effort to rebut the presumption of § 324.041 by these explanations is not credible.³ Even if it were, the only way to rebut the presumption of § 324.041 is through a "valid prescription for the controlled substance."

Femmer's unlawful possession of marijuana constituted a violation of § 195.202. Therefore, she is subject to discipline under § 335.066.2(1) and (14).

³ We must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Reg'n for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). Members of this Commission may determine the credibility of a witness despite not being present to hear and observe the testimony in question. *Angelos*, 90 S.W.3d at 193.

Summary

Femmer is subject to discipline under § 335.066.2(1) and (14).

SO ORDERED on January 14, 2015.

\s\ *Audrey Hanson McIntosh*
AUDREY HANSON MCINTOSH
Commissioner